No. 90-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

v.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE MCKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER and STEVE MCLEMORE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should limit or reverse its ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), when the effect of such action would obstruct the ability of Congress to maintain a prosperous national economy and disrupt what is now uniform application of the law.

2. Whether Congress intended that the statutory exemptions of certain categories of employees from the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) are to be applied more expansively to state and local government employees than to Federal and private sector employees.

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INTRODUCTION

Petitioner County of Kern requests in this proceeding that the Court limit or entirely foreclose the ability of the United States Congress to regulate the wages and hours of state and local governmental employees. Another California county also seeks such relief from the Court in *County of Los Angeles v. Daniel E. Bratt, et al.*, No.

90-927, 912 F.2d 1066 (9th Cir. 1990). These agencies argue that the Court should reconsider and reverse the decision it rendered a mere five years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). They state that the "intrusive national regulation" of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) "abrogates state and local government ability to determine and implement the means of delivering traditional government services to meet local needs" (Petition of Los Angeles County at p. 7) and that "public employers are being unjustifiably forced to abandon traditional civil service rules, structure, checks and balances." (Petition of Kern County at p. 16.) In effect, these agencies contend that under the United States Constitution, the ability of Congress to maintain a prosperous national economy is subordinate to the ability of state and local governments to independently establish the wages and hours of their employees.

The Congress is faced today with a severe crisis in the banking and savings and loan industries. It must also cope with a national economy that is in a rapidly worsening recession. The Fair Labor Standards Act is one of the essential tools used by Congress to maintain an adequate standard of living for all Americans and promote full employment.[1] The state and local governmental workforce is so large now that Congressional regulation of the wages and hours of these employees is equally as critical to the maintenance of a prosperous national economy as Congressional regulation of the wages and hours of Federal and private sector employees.[2] If Congress is deprived of the necessary tools

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[1] *See* Ronald G. Ehrenberg & Paul L. Schumann, *Longer Hours or More Jobs?* (1982) for an overview of the debate on the wisdom of increasing the overtime premium as a way of stimulating employment growth and reducing unemployment and a summary of the relevant empirical evidence on the issue.

[2] The Bureau of the Census reports that in 1988 the total workforce in the United States was 118,104,000 persons, and that 14,402,000 persons, which is more than ten percent of the total

to effectively address the economic problems with which our nation is currently faced, state and local governments are likely to suffer tax revenue losses, escalating unemployment insurance and welfare benefit claims, and other economic harm far beyond the costs imposed upon them through application of the Fair Labor Standards Act.

This Court correctly recognized in *Garcia* that Federal regulation of the wages and hours of the employees of state and local governments is fully consistent with previously accepted constitutional principles of federalism. After *Garcia*, Congress amended the Act at the instigation of state and local governments to alleviate any unexpected hardship that might be caused by its immediate application to those agencies. Nothing prevents state and local governments from petitioning Congress to further amend the Act if its provisions continue to be inappropriately burdensome for them. Congress is better able than this Court to weigh the costs which the Act imposes upon state and local governments against the benefits thereby provided to the national economy, and is therefore better able to decide whether it would be in the national interest to limit or eliminate application of the Act to those agencies. For all of these reasons as well as those expressed below, the Court should reject the invitations for it to revisit its holding in *Garcia* and should deny the petitions of Kern County and Los Angeles County for writs of certiorari.

STATEMENT OF THE CASE

Background

The Fair Labor Standards Act of 1938, as amended, provides certain minimum wage and overtime protections to workers who are covered by the Act. Section 6(a) (29 U.S.C. § 206(a)) requires that employers must pay their workers at least the prescribed minimum hourly

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workforce, were employed by state and local government. United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 1990 (110th Ed.), p. 395.

wage ($4.25 an hour after March 31, 1991). Section 7(a) (29 U.S.C. § 207(a)) provides in part that employers must pay their employees at one and one-half times their regular rate of pay for hours worked in excess of forty (40) per workweek. The purpose of this "overtime" pay requirement was to fairly and fully compenate employees who are forced to work long hours while providing economic incentives to employers to reduce the hours of work and to hire additional persons.

In 1974, Congress passed certain amendments to the Act which extended its coverage to state and municipal employers as of January 1, 1975. However, due to the unusual working conditions and long tours of duty of fire fighters and some law enforcement employees and in order to alleviate the financial burdens that might otherwise be imposed on public employers, Congress added section 7(k) (29 U.S.C. § 207(k)) as a special overtime provision for employees in those categories. Instead of requiring overtime compensation after forty (40) hours of work in seven (7) days, this section established a higher threshold that would, over several years, be reduced to 216 hours in a 28-day work period (or, proportionately, 54 hours in seven (7) days). Alternatively, if studies conducted by the United States Department of Labor showed that the hourly overtime threshold for these employees should be lower than 216 hours, then such lower hourly threshold would apply.

Many state and municipal employers proceeded to negotiate agreements with their employees for implementation of the Act. However, one day before the date upon which the 1974 amendments were to become effective, Chief Justice Burger issued an order staying their enforcement. *National League of Cities v. Brennan*, 419 U.S. 1321 (1974). Subsequently, this Court held in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that it was beyond the authority of Congress to impose the Act's minimum wage and overtime regulations on

state and local government employees because this would "directly displace the States' freedom to structure integral operations in areas of traditional government functions. . . ." 426 U.S. at 852. Throughout the decision, the Court expressed its concern that if the states did not retain control over their employees' hours of work and levels of compensation, the states would be forced to raise taxes or cut services to meet any increased costs. Consequently, the Court found that state sovereignty and the Tenth Amendment set limitations on the commerce power and that Congress cannot "wield its power in a fashion that would impair the States' 'ability to function in a federal system'." *Id.*

It is clear that *Usery* was an aberration at the time it was issued, and was eroded so rapidly and steadily that it never became accepted constitutional doctrine.

Usery expressly overruled *Maryland v. Wirtz*, 329 U.S. 183 (1968), which had upheld the application of the Act to certain state employees. In debating and passing the 1974 amendments, members of Congress generally considered the constitutionality of the proposed extension to state and municipal employees as an issue that had been settled by *Wirtz*. As Rep. Jordan commented,

> Some people are concerned about the separation of powers and possible infringements on the privileges of other levels of government. The U.S. Supreme Court does not see things that way, because they have already upheld the authority of Congress to cover state and local employees. This opinion was delivered in *Maryland v. Wirtz*, 392 U.S. 183 (1968), a case which the 1966 coverage of employees of state and local hospitals and schools was upheld.

Remarks of Rep. Jordan, 93d Cong., 2d Sess. 24 (1974), reprinted in 1 *Legislative History of the Fair Labor Standards Amendments of 1974 (Pub.L. No. 93-259)* (1976) at 263. *See also*, S. Rep. No. 93-690, *Id.*, at 1528.

Usery was thus clearly a true break with past constitutional precedent. That it might not endure for long was suggested by the opinion itself. Justice Rehnquist's decision was joined by only three other justices. In a concurring opinion, Justice Blackmun agreed that the 1974 amendments were unconstitutional but stated that he was uneasy about the decision. "Although I am not untroubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother Brennan." *Usery, supra*, 426 U.S. at 856.

Justice Brennan, with whom Justices White and Marshall joined, bitterly denounced the majority for abandoning precedent:

> The reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," . . . not only suggests that they overrule governing decisions of this Court that address this question but must astound scholars of the constitution.

Id., at 861-62.

Justice Brennan pointed out that since the time of Chief Justice John Marshall, the political process, not the Constitution, has been the source of restraint upon Congressional exercise of its commerce power. *Id.*, at 857. He charged that:

> Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree.

Id., at 867.

Justice Stevens dissented in a milder tone, stating that although he, too, disagreed with the wisdom of the 1974 amendments, the principle upon which the *Usery* holding rested was difficult to perceive. He wrote:

> The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.
>
> The Federal government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State qua State, I have no doubt that they are subject to federal regulation.

Id., at 880-81.

As soon as the *Usery* decision was published, legal commentators began to predict its demise. One noted that:

> If anything seemed settled in contemporary American Constitutional law, it was the meaning of the Tenth Amendment. Chief Justice John Marshall stated, almost in the beginning, that the Amendment expressed no limitation on the powers of the national government.

Barber, S., *National League of Cities v. Usery: New Meaning For The Tenth Amendment*, 1976 Supreme Court Review 161. Writing when *Usery* was still new, Barber predicted that the doctrine of *Usery* would not survive, although some of the state's rights values that it embodied might legitimately be fostered in other ways. Barber stated:

> *League of Cities* would thus transport us from a regime which has sacrificed states' sovereignty for congressional supremacy to a regime in which the Court will balance states' rights against interests

> represented by Congress. One cannot read the several opinions of the case and be confident about its future. Without a doubt the decision will be roundly condemned by constitutional scholars. Solid constitutional ground for the holding will be difficult to discover. The decision departs from the expressed terms of the Constitution even as Mr. Justice Rehnquist himself previously understood those terms. It virtually ignores contrary opinions by Chief Justice Marshall, enjoying in most quarters the status of founding documents. The decision seems in conflict with Mr. Justice Rehnquist's expressed views that judicial policy making is contrary to the language and intent of the framers.

Id., at 164 (footnote omitted).

Seven years after *Usery*, the commentator Bernard Schwartz concluded that *Usery* had failed to turn back the constitutional clock to the days of dual federalism under which earlier Federal and state governments were to regard each other as equals. Schwartz, B., *National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out To Be Only A Judicial Molehill?*, 52 Fordham L. Rev. 329 (1983). Schwartz joined in the prediction of other constitutional scholars that "[r]ather than restoring the traditional concept of dual federalism, *National League of Cities* may prove only an abberation." *Id.*, at 330.

Usery resulted in a confusing array of judicial decisions as to which state and local government functions were traditional and which were not. In many instances, this Court applied *Usery* so narrowly that it can be said not to have followed it at all. For example, the Court held after *Usery* that states may be liable for back pay as employers under Title VII of the Civil Rights Act of 1964 (*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)), that cities may be liable in some circumstances for violation of the Federal antitrust laws (*Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982)), that states

must meet mandatory minimum Federal standards for surface mining operations (*Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981)), that states must consider the Federal standards for regulation of electric and gas utilities (*FERC v. Mississippi*, 456 U.S. 742 (1982)), that Federal labor law can be applied to the state-owned Long Island Railroad (*United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982), and that the Age Discrimination in Employment Act applies to state and local governments (*EEOC v. Wyoming*, 460 U.S. 226 (1983)).

As one writer noted, commitment to principled decision-making required either that the Court apply *Usery* to all cases coming before it, or that the Court overrule it. *See* Fiax, K., *In the Wake of National League of Cities v. Usery: A "Derelict" Makes Waves*, 34 S.C.L. Rev. 647, 684 (1983).

The Court ultimately agreed and, in 1985, expressly overuled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528. The decisive vote of Justice Blackmun, who reversed the position he had taken in *Usery*, resulted in the virtual reinstatement of *Maryland v. Wirtz*, *supra*, 392 U.S. 183. The Court found that the "traditional governmental function" test of *Usery* was both unworkable and inconsistent with the federalist principles embodied in the Constitution. Noting that the states had successfully exerted their influence in the political process to exempt themselves in whole or part from a wide variety of obligations imposed by Congress under the Commerce Clause, including the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act, the Court concluded that state and local governments must also rely upon the political process rather than the processes of this Court to limit or eliminate the application to them

of the minimum wage and overtime provisions of the Fair Labor Standards Act. *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S. at 553-555.

State and local governments received the message of this Court and turned to Congress for relief. As the result, the application of *Garcia* was delayed by passage of the Fair Labor Standards Act Amendments of 1985 (Pub.L. 99-150). In response to complaints from state and local governments that they were not prepared for the financial burdens imposed upon them by the Act, Section 2(c) of those Amendments provided that state and local governments would not be liable for overtime violations of the Act until April 15, 1986, and would not be required to make actual payment of overtime compensation until August 1, 1986. This had the effect of retroactively wiping out the liability for overtime pay that state and local governments would otherwise have accrued from the date of *Garcia* through April 14, 1986.

Congress also took action to preserve the common practice of state and local governments to provide compensatory time off in lieu of overtime pay. Section 2(b) of Pub.L. 99-150 provided that: "A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)) [subsection (o) of this section]." Through the addition of section 7(o) (29 U.S.C. § 207(o)) to the Act, Congress allowed state and local governments, but not private employers, to reduce the costs of overtime work by substituting compensatory time off for overtime pay, provided that an employee's accumulation of compensatory time does not exceed 240 hours or, in the case of public safety employees, 480 hours.

The Facts of This Case

Employees in the ranks of Captain and Battalion Chief in the Kern County Fire Department brought this action on October 27, 1986, after the county declared that they were "bona fide executive employees" exempt from the overtime provisions of the Fair Labor Standards Act pursuant to 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.1. The Kern County Fire Department employs 28 persons in the rank of Battalion Chief, 171 persons in the rank of Captain, 193 persons in the rank of Engineer, 111 persons in the rank of Firefighter, and 6 persons in the rank of Heavy Equipment Operator. After *Garcia*, the county began providing overtime compensation to employees in the ranks of Engineer, Firefighter, and Heavy Equipment Operator in compliace with the Act. Prior to trial, the county conceded that employees in the rank of Captain are also covered by the Act. Accordingly, the only issue addressed at trial was whether the terms and conditions of employment of Battalion Chiefs meet the criteria for the "bona fide executive employee" exemption.

The administrative regulations promulgated pursuant to the Act establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. § 541.1 (a-f). The exemption does not apply unless an employee meets both tests. *Hodgson v. Barge, Waggoner And Sumner, Inc.*, 377 F.Supp. 842, 844 (M.D. Tenn. 1972), *aff'd without opinion*, 477 F.2d 598 (6th Cir. 1973).

With regard to the requirement that an employee must be paid on a "salary basis" in order to qualify as a "bona fide executive employee" exempt from the minimum wage and hour protections of the Act, a critical requirement is that the employee's pay not be subject to a deduction for absences shorter than a full day. Although 29 C.F.R. §§ 541.118(a)(2) and (3) provide that deductions made from an employee's pay for absences from work for a day

or more for personal reasons or, in the event the employer has a plan of providing compensation for loss of salary for sickness or disability, for sickness or disability, do not affect the salaried status of the employee, deductions for absences shorter than a full day fall under neither exception. "A salaried professional employee may not be docked pay for fractions of a day of work missed." *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983). This is because payment by the hour worked is completely antithetical to the concept of an executive as an employee whose responsibilities are not measured in hours but rather in his performance of a particular task. Consequently, an employee compensated for his services on an hourly basis, rather than a salary basis, is not a "bona fide executive," even though he may have supervisorial duties and responsibilities and possess greater authority than his subordinate employees. *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 466 (9th Cir. 1973); *Craig v. Far West Engineering Co.*, 265 F.2d 251, 257-260 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959); *Donovan v. Kentwood Development Co., Inc.*, 549 F.Supp. 480, 484 (D.Md. 1982); *Ulright v. Zenner & Ritter, Inc.*, 27 W&H Cases 1135, 1137-38 (W.D.N.Y. 1986); *Donovan v. Rockwell Tire & Fuel*, 26 W&H Cases 726, 733 (M.D.N.C. 1982).

The fact that the employer refers to the pay of an employee as a "salary" is not determinative of whether that employee is paid on a "salary basis" within the meaning of 29 C.F.R. § 541.118. The label that an employer gives to the compensation provided to an employee has little legal significance with regard to the issue of whether the requirements of the regulations have been met. *Retail Store Employees Union, Local 400 v. Drug Fair-Community Drug Co.*, 307 F.Supp. 473, 478 (D.D.C. 1969).

With regard to the "duties test," the regulations explain that an executive is something more than merely

a supervisor of other employees. "In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit that has a continuing function." 29 C.F.R. § 541.1(a).

The evidence at trial established that Battalion Chiefs in the Kern County Fire Department are covered by a collective bargaining agreement which provides that they are to receive overtime pay after the number of hours they work exceeds the equivalent of 56 hours per week on an average. These employees are also paid at straight time rather than time and one-half when they attend training classes which are held during hours outside of their regularly scheduled hours of work. Under the Act, fire protection employees are entitled to receive pay at the rate of time and one-half for all hours worked in excess of 53 hours per week on an average. Hence, a judgment that Battalion Chiefs are covered by the Act would result in payment to them at the rate of time and one-half rather than straight time for attendance at training activities and at the rate of time and one-half rather than straight time for three (3) hours of their 56 regularly scheduled hours of work each week.

The evidence also established that the county disregarded its own ordinances and administrative regulations when it declared that Battalion Chiefs are "bona fide executive employees." The county's employee relations ordinance prohibits the inclusion of management employees in a single employee representation unit with nonmanagement employees. However, employees in the rank of Battalion Chief were placed by the county in the same representation unit and are covered by the same collective bargaining agreement as the employees in all of the lower ranks of the fire department. The only ranks excluded from that representation unit are those of

Fir hief and Deputy Chief. Thus, the county's application of its own ordinances demonstrated that it had never deemed Battalion Chiefs to be management employees until it became obligated to provide compensation to its employees in accordance with the requirements of the Fair Labor Standards Act.

The county also treats its Battalion Chiefs in a manner clearly inconsistent with its declaration that these employees are "bona fide executives." Battalion Chiefs assigned to fire suppression duties are "56-hour fire duty" employees whose work shifts commence at 8:00 a.m. and conclude at 8:00 a.m. two days later for a scheduled duration of 48 hours. They must wear uniforms and remain within their battalion areas whenever they are on duty, including Sundays and holidays. They may not attend church while they are on duty and must obtain permission from a superior officer before taking time off from duty for personal business. They may not go to a barber shop for a haircut or engage in other activities while on duty that the public might think unsuitable for a uniformed employee during work hours. Any time taken off from work by Battalion Chiefs and other "fire duty" employees without prior authorization by a superior officer is time without pay. The Fire Chief and his Deputy Chiefs, on the other hand, are provided by the county with the benefits and perquisites usually reserved for executives. Deputy Chiefs do not wear uniforms. A Deputy Chief in charge of one of the fire department's three shifts is scheduled to work 10-hour days on those days when that shift is on duty and is also scheduled to be on duty every Tuesd y and Wednesday. However, these Deputy Chiefs may take time off from their scheduled hours of work without deduction from their pay to play golf, and are not required to go into the office but instead are free to stay home and watch football games or engage in family activities when they are scheduled to work on a holiday, so long as they are

available by pager or telephone. They are also free to attend church on the Sundays when they are in charge of the department's operations. As long as the time which they take off from work for personal affairs is of a short duration and they appoint someone else to be in charge while they are gone, they receive their regular pay for that time without being required to report that time as paid leave. It is not considered inappropriate conduct for Deputy Chiefs to go to a barber shop to get their hair cut during their work hours.

It was also made clear by the evidence that Battalion Chiefs in the Kern County Fire Department implement policy rather than make policy. The battalions within the Kern County Fire Department do not have separate, autonomous budgets within which Battalion Chiefs have authority or discretion to establish their own priorities for purchases of supplies and equipment or for expenditures on personnel. Instead, all such priorities are established by the Fire Chief and the Deputy Chiefs. The Fire Chief and Deputy Chiefs make all decisions regarding the tools and supplies that are purchased for and kept in the fire stations and on the fire engines in each battalion for use in responding to emergencies, the training methods and practices that are to be followed in each battalion, the selection of employees who are to be assigned to each battalion, and the techniques that are to be used by the employees in each battalion in the performance of their work. Battalion Chiefs do not have the authority to grant or approve overtime work except in certain emergency situations. Battalion Chiefs do not have the authority to decide which fire stations within their battalion areas are to be operational and which are not. Battalion Chiefs have no authority to determine the number of fire engines that are to be assigned to each fire station in their battalions, or which engines are to be assigned to which stations, or even the amount and types of fire hose that is to be carried on each fire engine.

A Battalion Chief does not have the authority to equip the fire engines in his battalion with the amounts and types of hose that he believes would be most effective in protecting the buildings in his battalion area, or to call in volunteer fire fighters or move fire companies from other battalion areas into his battalion area to provide interim fire protection while the regular fire companies in his battalion are engaged in responses to emergencies, or to withhold fire companies in his battalion from responses to fire calls from locations in other battalion areas, except with approval from a Deputy Chief.

Notwithstanding this evidence, the district court concluded that the terms and conditions of employment of Battalion Chiefs in the Kern County Fire Department met both the "duties test" and the "salary basis test" for exemption from the Fair Labor Standards Act as "bona fide executive employees," and entered judgment in favor of the county. That judgment was reversed by the Ninth Circuit Court of Appeals, which held that Battalion Chiefs are not "salaried" within the meaning of the regulations defining the "salary basis test." Because this finding was all that was necessary for reversal, the Ninth Circuit did not decide whether the district court also erred in its conclusion that the terms and conditions of employment of Battalion Chiefs are sufficient to meet the "duties test." [3]

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[3] The county's request that this case be remanded to the Ninth Circuit with instructions to reinstate the judgment of the district court would thus not be appropriate even in the event this Court were to rule that the Ninth Circuit erred in its holding that the terms and conditions of employment of Battalion Chiefs do not meet the "salary basis test." Instead, the matter would have to be remanded to the Ninth Circuit with directions that it determine whether the district court erred in its conclusion that the terms and conditions of Battalion Chiefs are also sufficient to meet the "duties test."

ARGUMENT

I. THE COURT SHOULD DECLINE THE COUNTY'S INVITATION TO OVERTHROW SETTLED PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION THAT ARE NOW INCORPORATED INTO PUBLIC EMPLOYER-EMPLOYEE RELATIONSHIPS THROUGHOUT THE NATION.

During the five year period since the decision of this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528, state and local governments throughout the nation have incorporated the minimum wage and hour protections of the Fair Labor Standards Act into their statutes, ordinances, and collective bargaining agreements. Time and one-half for overtime has finally become a reality for employees who, for too many years, had been relegated to the status of second class citizens. Skilled and capable workers need no longer leave public employment for the private sector in order to obtain full and fair compensation for their labor.

The counties of Kern and Los Angeles nevertheless ask this Court to turn back the clock and return to the confusing precepts of *National League of Cities v. Usery* and its muddled progeny. Even though they are unable to show that there has been any real difference during the past five years in their ability to determine and implement the means of delivering traditional government services to meet local needs, or that state and local governments have been unable to meet the financial burdens imposed upon them by the Act, these counties nevertheless argue that these abstract considerations justify a decision by this Court to revisit *Garcia* and reinstate *Usery*.

Practical considerations compel the opposite conclusion. When this Court issued its decision in *Usery*, the Act had yet to be implemented by state and local governments. Today, however, the Act is accepted as

the law of the land for all public and private sector employees. Accordingly, a decision by this Court to revisit *Garcia* would cause a massive disruption in settled employment relationships. State and local governments, having already implemented the minimum wage and overtime protections of the Act for the great majority of employees in their workforces, would face extreme resistance from those employees against any attempt to rescind the statutes, ordinances and collective bargaining agreements in which those protections are currently incorporated. It would be no less difficult to make an omelette back into an egg. Widespread labor unrest and interruptions of essential public services is the obviously foreseeable result.

In order to fashion an argument to suit its purposes, Kern County has greatly exaggerated the effect of the decision of the Ninth Circuit in this action. A clear example of such exaggeration is the county's contention at page 3 of its petition that its "fiscal exposure to date for potential back overtime pay to the 28 Battalion Chiefs is in the hundreds of thousands of dollars." These employees were already entitled under their collective bargaining agreement with the county to be paid at the rate of time and one-half for all hours which they work in excess of 56 hours per week on an average. The effect of the decision of the Ninth Circuit is that these employees will be paid at the rate of time and one-half rather than straight time for the hours which they work in excess of 53 hours per week on an average rather than 56 hours per week on an average. This is an increase of one and one-half hours of pay per week from the amount they now receive. As noted by the county at page 4 of its petition, their annual salaries range from $40,536.00 to $49,476.00. The maximum pay for Battalion Chiefs is thus $951.47 per week. Since they work an average of 56 hours per week, their maximum hourly wage rate is $17.08. One and one-half hours of pay at this hourly

rate is $25.62. Fifty-two weeks of additional pay in this amount totals $1332.24 per year. Thus, if all 28 Battalion Chiefs received this amount of additional pay each year, the total annual cost to the county would not be hundreds of thousands of dollars, as claimed by the county, but rather 28 times $1332.24, or $37,302.74. This relatively inconsequential sum is far less than the overtime liability which the county acknowledged to the 171 Captains in the Kern County Fire Department after the commencement of this litigation. The county has made no showing that it had any difficulty in finding the means to meet that liability, nor that it had any difficulty in finding the means after *Garcia* to provide overtime compensation to 193 Engineers, 111 Firefighters, and 6 Heavy Equipment Operators as required by the Act. It is reasonable to assume that the county would have far less difficulty in finding the means to meet its overtime liability to 28 Battalion Chiefs than in finding the means to meet its overtime liability to those 481 subordinate personnel. Hence, the county's claim that it faces the prospect of bankruptcy as the result of the Ninth Circuit's decision in this action is plainly specious.

The import of this Court's decision in *Garcia* is that Congress is better able than this Court to weigh the costs of minimum wage and hour legislation to state and local governments against the benefits of such legislation to the national economy. The county fails to show that it availed itself of the special exceptions for state and local governments which Congress included in the 1985 Amendments to the Act after this Court's decision in *Garcia*, such as the provision that allows state and local governments to substitute compensatory time off in place of pay for overtime work, and yet was still unable to deliver traditional government services so as to meet local needs. It is therefore unable to demonstrate the actual existence of any compelling need that would justify interference by the Court with the balance that Congress struck in

the 1985 amendments between the competing interests of state and local governments and the national economy.

Furthermore, this Court made clear in *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*, 452 U.S. 264, that when a violation of the Tenth Amendment is alleged, the determining issue is not the potentially harmful effect of Federal legislation on state and local governmental finances but rather the nature of the Federal action. The Court stated:

> Moreover, even if it is true that the Act's requirements will have a measurable impact on [the State's] economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.

Id., at 292 n.33.

For all of these reasons the Court should decline Kern County's invitation to revisit the holding of *Garcia* that Congress acted within the authority granted to it by the Commerce Clause when it imposed the minimum wage and overtime provisions of the Fair Labor Standards Act upon state and local governmental employees.

II. NO JUDICIAL OR LEGISLATIVE AUTHORITY SUPPORTS THE COUNTY'S CONTENTION THAT THE "BONA FIDE EXECUTIVE EMPLOYEE" EXEMPTION OF THE FAIR LABOR STANDARDS ACT IS TO BE APPLIED MORE EXPANSIVELY TO STATE AND LOCAL GOVERNMENT EMPLOYEES THAN TO FEDERAL AND PRIVATE SECTOR EMPLOYEES.

The Court should also decline the county's invitation to address and decide the issue of whether the "bona fide executive employee" exemption of the Fair Labor Standards Act is to be applied more expansively to state and local government employees than to Federal and private sector employees. In the first place, the county did not present any argument to the district court or to the

Ninth Circuit Court of Appeals that Congress intended such a result. As a general rule, absent exceptional circumstances, this Court will only consider and decide issues that have first been presented to the lower courts for decision. *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Patrick v. Burget*, 486 U.S. 94 (1988). Moreover, the county is unable to cite any judicial or legislative authority whatever in support of this proposition. Its arguments on this point are manifestly without merit and thus clearly not deserving of a full hearing by the Court.

The committee reports and the official House of Representatives report leading to the 1974 Amendments make clear that when Congress extended the Fair Labor Standards Act to state and local government employees in 1974, it was the intent of Congress that the same minimum wage and hour standards are to be applied to government that government applies to private sector employers. The 1973 Senate report leading up to the 1974 amendments states:

> The Committee recognizes and the bill reflects an awareness that to raise the minimum wage without expanding the coverage of the Act would serve to deny even the minimum benefits of the Act to large groups of workers who have been denied the protection of the Act for more than 30 years. . . . Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize—his employer, whether that employer is engaged in private business or in government business.

S. Rep. No. 300, 93d Cong., 1st Sess., at 17, 25.

The 1985 Amendments, adopted after *Garcia*, were not intended to signal a retreat from that position. In adopting those amendments, Congress expressly reaffirmed its previous commitment that state and local governmental employees are to be provided with all of the protec-

tions which the Act accorded to employees of the Federal government and the private sector:

> In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of your most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers have now been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. *The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.*

S. Rep. No. 159, 99th Cong., 1st Sess., at 7 (emphasis added.)

To the extent that state and local governmental employers have special circumstances which require different treatment of overtime work under the Act, Congress addressed those special circumstances in 1974 through the adoption of section 7(k) (29 U.S.C. § 207(k)), which establishes that fire protection personnel need not be paid at the rate of time and one-half until they work 53 hours per week on an average, and in 1985 through the adoption of section 7(o) (29 U.S.C. § 207(o)), which permits state and local governmental employers but not private sector employers to provide compensatory time off in lieu of overtime pay. As Kern County notes at page 6 of its petition, a number of bills were introduced in Congress after *Garcia* that would have substantially restricted or entirely eliminated the application of the Act to state and local governmental employers. However, the compromise bill ultimately adopted by Congress made no change to

section 13 of the Act (29 U.S.C. § 213), which defines the categories of employees exempt from the Act. If Congress had intended to create distinctions in the scope of the Act's coverage as between state and local government employees and Federal and private sector employees, it would have expressly done so by amending section 13 just as it expressly permitted state and local governmental employers to provide compensatory time off in lieu of overtime pay by its amendment of section 7. The fact that the 1985 Amendments made no change to section 13 thus indicates the intention on the part of Congress that the categories of employees defined in section 13 as exempt from the Act are to be applied to state and local governmental employees in the same manner as they have been and currently are applied to Federal and private sector employees.

The county contends at pages 6-7 of its petition that the 1985 Amendments should instead be given a meaning consistent with the bills that were introduced after *Garcia* which would either have entirely exempted state and local governments from application of the Act or would have exempted those agencies from the Act's overtime provisions. However, as the county concedes, these bills were not adopted. This Court declared in *Bob Jones University v. United States*, 461 U.S. 574 (1983) that the failure of Congress to amend legislation is ordinarily of no value in the interpretation of that legislation:

> Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. See, *e.g.*, *Aaron v. SEC*, 446 U.S. 680, 694, n.11 (1980). We have observed that "unsuccessful attempts at legislation are not the best of guides to legislative intent," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969).

Id., at 600.

Accordingly, the county is unable to make any plausible argument in support of its contention that Congress in-

tended for the "bona fide executive employee" exemption of the Fair Labor Standards Act to be applied more expansively to state and local government employees than to Federal and private sector employees.

Equally without support is the county's contention that the Act should only be applied to state and local governmental employees whose jobs are "nonsupervisory." The county again seeks to revisit an issue that is now well settled. In 1949, following hearings on the issue of whether the definition of a "bona fide executive employee" should be revised, the Administrator of the Wage and Hour Division of the Department of Labor adopted a recommendation of the Presiding Officer that this exemption not be equated with the definition of the term "supervisor" in the 1947 Taft-Hartley Act. The Presiding Officer explained that the language of the two statutes evidenced a clear difference in legislative intent:

> There are also other indications that the provisions of the two statutes were formulated with different objectives in mind. That the Administrator's regulations were known to the Congress is evident from the fact that the Taft-Hartley definition of "professional employee" parallels very closely, in part, the Administrator's definition of "bona fide professional." It is reasonable to assume that the Congress also knew that these regulations deal with "bona fide executive" employees. Nevertheless, the Congress chose to exclude from the definition of employee in the Taft-Hartley Act "supervisors" rather than "bona fide executives," which seems to me an obvious expression of a difference in intent.

United States Department of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations On Proposed Revisions Of Regulations, Part 541, Defining The Terms "Executive", "Administrative", "Professional", "Local Retailing Capacity", And "Outside Salesman"*, June 1949, pp. 4-5.

The Presiding Officer based his recommendation in part on the fact that employees who hold management and supervisory positions have no collective bargaining rights and therefore often have an even greater need than rank and file employees for the minimum wage and hour protections of the Act:

> In enacting the Taft-Hartley Act, the Congress evidently sought to give effect to its judgment that supervisors should not be protected by the National Labor Relations machinery if they organize and bargain collectively. If the further step were to be taken of adopting the definition of "supervisor" for the Administrator's regulations, these very employees would, in addition, be denied the protection of the Fair Labor Standards Act. It appears to me, by contrast, that the enactment of the Taft-Hartley Act with its definition of "supervisor" has made increasingly important the need to distinguish carefully between those whom the Congress intended to exempt as "bona fide executives" because they do not need the protection of the Fair Labor Standards Act, and those who, though they may perform some supervisory duties need the protection of the Fair Labor Standards Act because they do not have the privileges and benefits which normally accrue to bona fide executives.

Id., at p. 5.

There is no reason to assume that Congress was any less aware of the well settled meaning of the "bona fide executive employee" exemption when it passed the 1985 Amendments to the Fair Labor Standards Act. Because those amendments made no change to section 13(a) of the Act (29 U.S.C. § 213(a)), which provides for that exemption, the manifest intent of Congress was that this exemption is to be applied to state and local governmental employees in management and supervisory positions in the same manner that it has been applied in the private sector.

The "nonenforcement policy" adopted by the Department of Labor in a Letter Ruling dated January 9, 1987, is also of no assistance to the county. That policy, which is set forth in its entirety in the Appendix to this brief, was intended only to address those special circumstances in which a state or local governmental employer is required by legal constraints to make deductions from the pay of its employees for time not worked. By its own terms, it did not expand the "bona fide executive employee" exemption nor eliminate the "salary basis" test for that exemption. Instead, it decreed only that the Department of Labor

> . . . will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).
>
> This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable state or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

Where, as here, there are many other indicia that Battalion Chiefs are not paid on a "salary basis" in addition to the country's policy of making deductions from their wages for absences of less than a full day, this nonenforcement policy is simply irrelevant.

Moreover, this policy explicitly states that it is not intended to affect any employee's rights under section 16(b) of the Act (29 U.S.C. § 216(b)), and thus is not applicable in a suit brought by a private citizen.

In any event, the county did not introduce any local ordinance or regulation into evidence at trial, and has not cited any such local ordinance or regulation in its petition, that would actually prevent it from making payments to an employee for absences of less than a day for personal reasons, or because of illness or accident, which are not covered by available paid leave. Although it is undisputed that the county's policy is to make such deductions from the pay of Battalion Chiefs, the evidence demonstrated that the county applies a different policy to its Fire Chief and Deputy Chiefs and does not hold those employees accountable for their work on an hourly basis. The fact that the county is thus able to compensate its Fire Chief and Deputy Chiefs on a "salary basis" demonstrates the mendacity of its contention that it must employ Battalion Chiefs on an hourly basis to avoid a violation of the prohibition against gifts of public funds which, according to the county, appears in Article XVI, section 16 of the California Constitution.

That prohibition is actually set forth in Article XVI, section 6 of the California Constitution. It has never been interpreted by any court or administrative agency as requiring that all state and local government employees must be employed by the hour rather than on a "salary basis." The Ninth Circuit correctly concluded that "so odd a policy" would not be a reasonable construction of Article XVI, section 6.

The decision of the Fourth Circuit in *Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990) does not interpret the United States Constitution, the Fair Labor Standards Act, or the regulations of the Department of Labor inconsistently with the decision of the Ninth Circuit in this action. *Hartman* involved Fire Shift Commanders employed by the Arlington County, Virginia Fire Department. The district court found that no deductions had been made from the pay of these employees except those permitted

under 29 C.F.R. § 541.118(a), and that the county had adopted a policy that their wages would not be subject to deduction for absences of less than one full work day. *Hartman v. Arlington County*, 720 F.Supp. 1227 (E.D. Va. 1989). Thus, on the one hand, a Battalion Chief in the Kern County Fire Department is required to be on duty all day, in uniform, on Christmas Day, even if there is no actual work for him to do that day, otherwise a deduction will be made from his pay. On the other hand, a Fire Watch Commander in the Arlington County Fire Department is apparently free to absent himself from duty and spend part of the day at home with his family on Christmas and holidays and still receive his full salary. A Fire Watch Commander in the Arlington County Fire Department is thus employed on terms more akin to the terms of employment of Deputy Chiefs than Battalion Chiefs in the Kern County Fire Department. The alleged inconsistency between the decision of the Ninth Circuit in this action and the decision of the Fourth Circuit in *Hartman* therefore results from distinguishable facts rather than from differing interpretations of the Constitution, the Act, and the regulations. Accordingly, there is no conflict between the decisions of the circuit courts of appeal requiring resolution by this Court.

The county has thus failed to cite any judicial or legislative authority whatever in support of its contention that the "bona fide executive employee" exemption of the Fair Labor Standards Act is to be applied more expansively to state and local government employees than to federal and private sector employees. Its request to this Court for review and decision of that issue should therefore be denied.

CONCLUSION

Petitioner Kern County is plainly unable to support its contention that the law since *Garcia* has been "inconsistent, in turmoil, and uncertain." Although there have been instances in which the courts have been required to decide whether state and local governments have improperly determined that some of their employees fall within the exemptions from the Act, the courts have also had many occasions to decide whether private sector employees were wrongfully being denied the benefits of the Act. It has been no more difficult for the courts to apply the standards for such exemptions to state and local government employees than to private sector employees.

Congress fully considered the unique nature and concerns of state and local governmental employers and thoroughly debated the matter when it extended the Act to all public employees in 1974, and again when it reaffirmed that action in 1985 after *Garcia*. The 1985 Amendments to the Act gave state and local governments time to prepare for the fiscal impact of compliance with the Act. Congress responded to the special circumstances unique to public employment with the adoption of section 7(k) (29 U.S.C. § 207(k)) in 1974 and section 7(o) (29 U.S.C. § 207(o)) in 1985. Kern County and other state and local governmental employers have thus already availed themselves of the political safeguards available to them through our representative government against any inappropriate imposition of unwarranted financial burdens from the Act. If they are dissatisfied with the legislation that resulted, they are free to return to Congress and seek further changes. They apparently believe they can obtain a better deal from this Court. It is clear, however, that coherent national policy in this realm may more readily be established by Congress than by the courts. This Court should therefore decline their request that it reconsider and reverse the decision it

rendered a mere five years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. 528, and deny the petition of Kern County in this action and the petition of Los Angeles County in action No. 90-927 for writs of certiorari.

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX

Letter Ruling dated January 9, 1987, of Paula V. Smith, Administrator, Wage and Hour Division, United States Department of Labor.

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness of accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator